Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	

COMMENTS OF SBC COMMUNICATIONS INC.

Robert M. Lynch
Roger K. Toppins
Michael J. Zpevak
Kathleen E. Palter
SBC COMMUNICATIONS INC.
One Bell Plaza, Room 3703
Dallas, Texas 75202
(214) 464-5610

Michael K. Kellogg
Rachel E. Selinfreund
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W., Suite 1000 West
Washington, D.C. 20005
(202) 326-7900

Counsel for SBC Communications Inc.

May 26, 1999

TABLE OF CONTENTS

EXECUTIVE SUMMARY

In light of the Supreme Court's decision in *AT&T Corp. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999), the Commission must now "determine on a rational basis *which* network elements must be made available, taking into account the objectives of the [1996] Act and giving some substance to the 'necessary' and 'impair' requirements" of section 251(d)(2)." *Id.* at 736. The Commission cannot simply assume that, where technically feasible, incumbents must provide access to all the elements in their network. At a minimum, the Commission must consider for every network element (1) whether the element is available from sources outside the incumbents' networks, and (2) whether lack of access to that element would increase competitors' costs or decrease the quality of their service sufficiently to "impair" their ability to provide the service in question. *Id.*

SBC believes that the Commission has already stated the relevant test for "impairment" under section 251: as the Commission explained in its *Local Competition Order* [at ¶ 315], network elements must be provided "on terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." This standard is true to the language and purpose of the 1996 Act and advances its pro-competitive goals. Congress wanted efficient new entrants to have access to those UNEs they need to compete, on terms that would allow them to compete. Section 251(d)(2) is designed to encourage this access while at the same time preventing too much unbundling, which would discourage CLECs and ILECs alike from making investments in new facilities and innovations to the detriment of consumers.

In this vein, there are five things the Commission must keep in mind in developing the test for "impairment" under section 251(d)(2). *First*, because the proper focus of section 251(d)(2) – and, indeed, any unbundling requirement – is to promote *competition* and not to aid

individual competitors, the identity of the specific requesting carrier is irrelevant. *Second*, and for similar reasons, the current business plans of various CLECs do not end the impair inquiry. The critical question is what *efficient* CLECs could do, not what specific CLECs are currently doing. *Third*, CLECs cannot bootstrap elements onto the Rule 319 list by relying on TELRIC pricing principles. The proper focus of the Commission's inquiry is not on the rate at which a regulator might set the price for the network element but on whether an efficient new entrant has a meaningful opportunity to compete against the ILEC by obtaining the element in question from a non-ILEC source. *Fourth*, section 271 does not relieve the Commission of its independent duty to apply the standards of section 251(d)(2). Congress's decision to include certain elements in the section 271 checklist simply reflects the fact that a BOC could have applied for section 271 relief before the FCC even issued its initial UNE rules. *Fifth,* in determining what elements should be included in Rule 319, no consideration can be given to Rule 315(b)'s requirement that incumbents not separate network elements already combined in their network. If an element, judged in isolation, does not meet the section 251(d)(2) test, the Commission may not order that element to be provided, notwithstanding any alleged convenience in a CLEC's obtaining that element already combined with another element that does meet the section 251(d)(2) test.

With these considerations in mind, and based on a detailed study of market facts, SBC proposes the following national standards for the Commission to adopt:

Loops. SBC agrees with the Commission that, at least for the immediate future, loops (but not subloops) should be unbundled for residential and small business customers. The facts conclusively show, however, that CLECs currently have available alternatives to ILEC loops to reach all large business customers (those with 20 lines or more) in wire centers serving 40,000

or more access lines in which CLECs have collocated. Moreover, as the Commission has recognized, fixed wireless, mobile wireless, and cable loops also have the potential to compete against ILEC loops. Accordingly, the Commission should implement sunsets that reflect the increasing viability of these alternatives. Specifically, unbundling of loops, even for residential and small business markets, should no longer be required once either (1) the incumbent cable operator begins offering telephony on TCP/IP protocols or their equivalent, or (2) the price of wireless service – with all of its advantages and features factored in – drops to the point that wireless is an economic substitute for wireline.

NIDs. NIDs should not be treated as independent UNEs under section 251(d)(2) because they are readily available on the open market, and ILECs enjoy few, if any, economies of scale or scope with respect to their purchase or installation. Although section 251(d)(2) does not require it, SBC will continue – voluntarily – to provide NIDs as part of the loop UNE (where available).

Local Switching. The ready-availability of low-cost, scalable switches, the overwhelming evidence of *actual* CLEC deployment of switches, and the extensive reach of those switches demonstrates that switching should not be a UNE wherever a rate exchange area is served by one or more switch-based CLECs.

Signaling Networks and Call-Related Databases. Signaling is inextricably tied to switching; thus, to the extent a CLEC purchases unbundled switching from an ILEC, the ILEC must also provide the CLEC with access to the ILEC signaling network. To the extent that CLECs provide their own switching or obtain switching from a non-ILEC, however, CLECs do not need access to an unbundled signaling capacity from the ILECs. CLECs are already

deploying their own signaling networks or using the networks of third parties – conclusively establishing the existence of viable alternatives to the ILEC network.

Interoffice Transmission Facilities. CLECs have already deployed fiber in all of the major metropolitan areas – and the majority of the second- and third-tier markets as well. This fiber provides competitive interoffice transport to ILEC wire centers, major IXC carrier POPs, and ILEC switches, as well as the CLECs' own switches. The facts conclusively show that competitive interoffice transport is available to and from dense ILEC wire centers (wire centers serving 40,000 or more access lines) that have one or more collocated CLECs. Accordingly, interoffice transport should not be subject to an unbundling requirement in such wire centers.

The definition of transport, moreover, should not include dark fiber. Dark fiber does not satisfy the statutory definition of a "network element" because it is not "*used* in the provision of a telecommunications service." 47 U.S.C. § 153(29) (emphasis added). Even if dark fiber does qualify as a network element, lack of access to it does not impair new entrants' ability to provide service. Dark fiber is widely available, and CLECs' success in laying fiber proves this point.

Operations Support Systems. CLECs can make a sufficient showing of need under section 251(d)(2) to justify a Commission determination that ILECs must provide access to OSS functions when a CLEC takes a required network element, required interconnection offering, or required resold service from an ILEC. ILECs do not, however, need to provide OSS functions to a CLEC to enable that CLEC to obtain a facility or service from a non-ILEC source.

Operator Services and Directory Assistance. The market facts clearly establish that ILECs should not be required to provide access to their own directory assistance and operator

services facilities as a UNE in any market. There is already a robustly competitive retail and wholesale market for operator services and directory assistance. And the necessary inputs to provide such services – databases, real estate, employees, and computers – are as accessible to CLECs as they are to ILECs.

Advanced Services. The Commission has already concluded that the advanced services market has an abundance of actual and potential competitors employing (or capable of employing) several different categories of broadband technologies. In fact, the Commission has concluded that non-phone company providers, including cable companies, electric utilities, and wireless cable companies, are further along in last-mile deployment of broadband to residential customers than ILECs. CLECs, therefore, do not need access to ILEC network elements *at all* in order to provide advanced services. Moreover, if the Commission continues to require loop unbundling, CLECs certainly need nothing more to provide advanced services because the necessary electronics are readily available on the open market. SBC will provide conditioned loops where they have already been conditioned. SBC is also willing to condition loops on demand, as long as CLECs agree to pay up-front a fair rate for the conditioning.

The Commission may not adopt a line-sharing requirement under section 251(d)(2) because CLECs do not need line-sharing to provide either voice or data, separately or together. In fact, a mandated line-sharing requirement would create a result entirely at odds with the 1996 Act: the Commission would hinder development of competition in the local residential voice market while giving CLECs an unjustifiable advantage in the advanced services market, which is already fully open to competition.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
	)	

COMMENTS OF SBC COMMUNICATIONS INC.

In its *Local Competition Order*,[1] the Commission started from the assumption that section 251(c)(3) of the Telecommunications Act of 1996[2] requires incumbents generally to make available all the elements in their networks to which it is feasible to provide access. The Commission interpreted section 251(d)(2)'s impairment standard to be met if "the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative cost of the service a requesting carrier seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network."[3]

The Supreme Court expressly rejected the assumption that incumbents must provide access to all elements in their networks, where technically feasible. "Section 251(d)(2) does not authorize the Commission to create isolated exemptions from some underlying duty to make all network elements available."[4] Rather, the Commission must "determine on a rational basis

---

[1] First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1996) ("*Local Competition Order*"), *modified on reconsideration*, 11 FCC Rcd 13042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999).

[2] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 *et seq.* ("Act" or "1996 Act").

[3] *Local Competition Order*, 11 FCC Rcd at 15643 [¶ 285].

[4] *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 736 (1999).

which network elements must be made available, taking into account the objectives of the Act and giving some substance to the 'necessary' and 'impair' requirements."[5] The Court further held that:

> The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. That failing alone would require the Commission's rule to be set aside. In addition, however, the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services is simply not in accord with the ordinary and fair meaning of those terms.[6]

Thus, the Court made clear that, before requiring an incumbent to provide any network element on an unbundled basis, the Commission must at a minimum carefully consider (1) whether that element is available from sources outside the ILECs' networks, and (2) whether lack of access to that element would increase competitors' costs or decrease the quality of their service sufficiently to "impair" their ability to provide the service in question – not merely whether there was *any* increased cost or decreased service quality.

In light of the Court's decision, the Commission has issued a *Second FNPRM*[7] to address how it should interpret the standards set forth in section 251(d)(2), and which specific network elements the Commission should require incumbent LECs to unbundle under section 251(c)(3). SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell, Nevada Bell, and the Southern New England Telephone Company (collectively "SBC") submit these comments in response to that *Second FNPRM*. In Part I, SBC discusses the statutory standards

---

[5] *Id.*

[6] *Id.* at 735.

[7] Second Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-70 (rel. Apr. 16, 1999) ("*Second FNPRM*").

of section 251(d)(2). In Part II, SBC applies those standards to the specific network elements listed by the Commission in the *Second FNPRM.*

I. Section 251(d)(2)

Section 251(d)(2) provides:

> In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether –
>
> (A) access to such network elements as are proprietary in nature is necessary; and
>
> (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

47 U.S.C. § 251(d)(2).

The text clearly establishes that the "necessary" standard only applies to "proprietary" network elements, whereas the "impair" standard applies to all network elements, including nonproprietary network elements. In subsection (A), "such network elements" is modified by proprietary, and therefore only proprietary network elements must be "necessary." In subsection (B), "such network elements" contains no modifier, so the "impair" standard applies to all network elements. The Commission, the Eighth Circuit, and the Supreme Court have all agreed with this reading.[8]

---

[8] In its *Local Competition Order*, the Commission noted that it is clear that the words "such network elements" in subsection (B) refer, without qualification, to the determination of "what network elements should be made available." In other words, the "impair" standard applies to all such network elements. *See* 11 FCC Rcd at 15642-43 [¶¶ 283-285]. By contrast, the "necessary" standard applies only to "such network elements as are proprietary." The Eighth Circuit made the same distinction. *See Iowa Utils. Bd. v. FCC,* 120 F.3d 753, 811 n.31 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). And that is plainly how the Supreme Court read the provision when it summarized "the 1996 Act's requirement that [the Commission] consider whether access to proprietary elements was 'necessary' and whether lack of access to nonproprietary elements would 'impair' an entrant's ability to provide local service. See § 251(d)(2)." *Iowa Utils. Bd.*, 119 S. Ct.

Accordingly, SBC will begin its discussion by focusing on the "impair" standard that applies to all network elements. SBC will then address the additional sense in which "proprietary" elements must be "necessary" to the new entrant. As requested by the Commission, SBC will also address whether nationwide standards are appropriate in determining what elements should be provided and what role, if any, state commissions should have in implementing such standards.

A. Interpretation of the Term "Impair" in Section 251(d)(2)(B)

The Supreme Court has made it clear that section 251(d)(2) directs the Commission to apply "*some* limiting standard, rationally related to the goals of the Act." *Iowa Utils. Bd.*, 119 S. Ct. at 734. In doing so, the Commission must consider "the availability of elements outside the incumbent's network" and may not indulge in an "assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element" requires unbundling. *Id.* at 735; *see also id.* at 736. The Court emphasized that a CLEC is not "impaired" for purposes of section 251(d)(2) simply because profits are lessened. *Id.* at 735 n.11. Rather, the critical inquiry is whether the inability to obtain a network element from the ILEC impairs the CLEC, in some meaningful way, in its ability to provide the services that it seeks to provide. *Id.* at 735.

In SBC's view, the Commission has already stated the relevant test for providing network elements in its *Local Competition Order*, 11 FCC Rcd at 15660 [¶ 315]. In discussing section 251's nondiscrimination obligation, the Commission ruled that network elements must be

---

at 728. The Supreme Court repeated this distinction when it rejected the argument that entrants, rather than the Commission, should "determine whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services." *Id.* at 735.

provided on "terms and conditions that would provide an efficient competitor with a meaningful opportunity to compete." *Id.* The Commission found that this standard is directly tied to the purposes underlying section 251. *Id.*

This test answers the question of *how* network elements should be provided. It also answers the question of *what* elements must be provided. In other words, Congress wanted efficient new entrants to have access to those UNEs that they need to compete, on terms that would allow them to compete. The Commission's perception of the goals underlying section 251 must inform both inquiries in the same way. It follows that the threshold test that every element in 47 C.F.R. § 51.319 ("Rule 319") must meet is whether failure to provide access to that particular network element would preclude *meaningful opportunities for competitive entry by an efficient competitor.*

This test for "impair" is true to the language and purpose of the Act and advances its pro-competitive goals. A test of "impair" that seeks only to maximize unbundling *per se* would run counter to the efficiency and consumer welfare goals of the 1996 Act. As Justice Breyer points out, "[i]ncreased sharing by itself does not automatically mean increased competition. It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge." *Iowa Utils. Bd.*, 119 S. Ct. at 754 (Breyer, J., concurring in part and dissenting in part).

Too much unbundling at TELRIC prices will all but eliminate the incentives of ILECs and CLECs to innovate and invest. "[A] sharing requirement may diminish the original owner's incentive to keep up or to improve the property by depriving the owner of the fruits of value-creating investment, research, or labor." *Id.* at 753. An over-broad sharing requirement will also discourage CLECs from investing in new facilities because they will instead have the incentive

to free-ride on the investments of ILECs and existing facilities-based CLECs. As Jerry Hausman and Greg Sidak explain in their affidavit in this docket, the availability of UNEs at TELRIC prices "not only attracts firms that could have deployed their own facilities, but also induces firms that could not have efficiently entered or expanded in the marketplace to do so."[9] It "gives imitators an advantage over innovators," thereby putting CLECs that have made facilities-based investments at a disadvantage.[10] This, in turn, tends to cause an unnecessary shift of resources and investment from the network to – at best – premises solutions. Targeting the boxes at the end of the loop or line inevitably benefits a select few, whereas innovations to the network inure to the benefit of all consumers.

Thus, excessive unbundling leads to an outcome that is "contrary to the interests of competition, consumer welfare, and the public interest"[11] – all of which is contrary to the 1996 Act. Indeed, that is why "the Act requires the FCC to apply *some* limiting standard, rationally related to" its goals. *Id.* at 734. Unlike the Commission's prior definition, the test we propose gives meaning to the "impair" standard and comports with the Supreme Court's decision.

We will spend considerable time developing the "impair" standard in the context of applying it to the specific network elements identified by the Commission. Before we do so, however, it is important to stress five things that are *not* a legitimate part of the inquiry under section 251(d)(2).

---

[9] Affidavit of Jerry A. Hausman & J. Gregory Sidak ¶ 79 ("Hausman & Sidak Aff.").

[10] Affidavit of Thomas M. Jorde, J. Gregory Sidak, & David J. Teece ¶ 50 ("Jorde, Sidak, & Teece Aff.").

[11] Hausman & Sidak Aff. ¶ 80.

First, the "impair" standard does not turn on the identity of the requesting carrier. The proper purpose of any unbundling requirement is to promote *competition*, not to aid individual competitors.[12] As the Commission itself recognized, section 251 is properly focused on what is needed to "provide an *efficient competitor* with a meaningful opportunity to compete."[13] If efficient competitors can provide service without access to a particular network element, it is irrelevant whether a less efficient competitor might claim that – due to size, cash flow, network configuration, or other considerations – it needs access to that element in order to compete.[14]

Second, and for similar reasons, the current business plans of various CLECs do not end the "impair" inquiry. For example, the fact that all the CLECs in a particular area might be using their switches only to target business customers does not mean that switching for residential customers should be provided as a network element. Those same switches that currently serve business customers could readily be used to serve residential customers as well.

Third, although costs are relevant to the analysis, CLECs cannot "bootstrap" elements onto the Rule 319 list by relying on the Commission's TELRIC pricing principles. In other words, the CLECs cannot argue that, because the TELRIC price for an element will be so low, no CLEC could do better by self-provisioning the element in question or obtaining it from

---

[12] *See* IIIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶¶ 771-774 (1996) ("Areeda & Hovenkamp"); Title of Part II of the Act (entitled "Development of Competitive Markets"); *see also* 142 Cong. Rec. S715 (daily ed. Feb. 1, 1996) (comments of Sen. Moynihan) (supporting the Act because it will "lead[] to greater economic *efficiency*") (emphasis added).

[13] *Local Competition Order*, 11 FCC Rcd at 15660 [¶ 315] (emphasis added).

[14] "[A]ll firms in the telecommunications industry are not alike. They differ in many respects including their starting places in the competitive battle, their abilities to raise capital, their efficiency in building facilities, and their managerial competence. It cannot be expected that all firms can or should succeed." Hausman & Sidak Aff. ¶ 71.

another source. Such sleight-of-hand would be antithetical to the Supreme Court's mandate and to the purposes of the Act in terms of developing genuine competitive alternatives to the ILEC. The proper focus is not on the rate at which a regulator might set the price for a network element from the ILEC or whether obtaining the element from another source places the CLEC at a cost disadvantage.[15] The proper focus is on whether an efficient new entrant has a meaningful opportunity to compete against the ILEC by obtaining the element in question from a source other than the ILEC.

In any event, any such attempt at "bootstrapping" on the basis of TELRIC would be inconsistent with the whole TELRIC inquiry, which was designed to determine the price at which an ILEC's network could be replicated using its wire center locations and the most efficient technology available. In adopting TELRIC, the Commission rejected a pricing methodology that would have allowed ILECs to recover the cost of network elements based upon their existing network design and technology in operation today. According to the Commission, this would result in prices "that reflect inefficient or obsolete network design and technology."[16] By definition, therefore, any network element that is priced at TELRIC should be available at that same price from another source and should be the most efficient technology available.

Fourth, the fact that the Bell Operating Companies are required to provide some elements in some circumstances in order to obtain section 271 relief says nothing about whether those

---

[15] *Cf. Iowa Utils. Bd.*, 119 S. Ct. at 735 (rejecting argument that a CLEC can make the requisite showing of need under section 251(d)(2) simply by proving that its profits would be lower without access to the element than with it).

[16] *Local Competition Order*, 11 FCC Rcd at 15848 [¶ 684].

elements should be included in a rule promulgated under sections 251(c)(3) and 251(d)(2). Congress's decision to include certain elements in the section 271 checklist reflects the fact that a BOC could have applied for 271 relief before the FCC even issued its initial UNE rules. That does not mean that Congress predetermined whether those elements would be required under section 251(d)(2). Congress mandated that the Commission go through the section 251(d)(2) inquiry before ordering that *any* element be made available. If Congress had wanted to require a minimum list of network elements, it could have and would have so provided. Section 271(c)(2)(B) does not relieve the Commission of its independent duty to apply the standards of section 251(d)(2).

Moreover, under checklist item (ii), 47 U.S.C. § 271(c)(2)(B)(ii), all section 251(c)(3) UNEs must be provided under the UNE terms. The terms relating to specific checklist items in section 271(c)(2)(B) (*e.g.*, loops, switching, transport) are less strict than the section 251(c)(3) terms. Thus, if anything, the presumption would have to be that Congress did not expect all elements listed in the checklist to be subject to section 251(c)(3). Otherwise, the specific checklist terms would be superfluous because they would impose no obligation not already imposed by checklist item (ii). Readings that render portions of a statute meaningless should be avoided. *See Lane v. Pena*, 116 S. Ct. 2092, 2100 (1996) (no statutory provision should be understood to be superfluous).

Finally, and perhaps most significantly, in determining what elements should be included in Rule 319, no consideration can be given to Rule 315(b)'s requirement that the ILECs not separate network elements already combined in their networks. If an element can be obtained from a source other than the ILEC, the mere fact that it might be less expensive and more

convenient to get that element from the ILEC already combined in the network with another element is not a sufficient basis to put it on the list of network elements that must be made available in the first place. If an element, judged in isolation, does not meet the section 251(d)(2) test, then the Commission cannot order that element to be provided, regardless of whether or not it is already combined in the ILEC's network. It is for this reason that the Supreme Court indicated that the whole question of the so-called "UNE platform" could become "academic" once the Commission properly applies section 251(d)(2). *Iowa Utils. Bd.*, 119 S. Ct. at 736; *id.* at 737. Each and every element of the platform must *independently* satisfy section 251(d)(2), and, "[i]f the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able to lease every component of the network." *Id.* at 736.

A concrete example might be useful to illustrate this last point. We anticipate that the Commission will conclude (at least for the near term) that ILECs must continue to provide loops for residential customers on an unbundled basis. As discussed below, however, the case for not requiring switching as an unbundled element is overwhelming. Switches are readily available on the open market, and numerous CLECs have deployed them. Such switches can be economical even for low volumes of customers. And, if a particular CLEC (CLEC-1) does not have sufficient demand to support a switch of its own, it can as readily obtain switch capacity from another CLEC (CLEC-2) as it can from an ILEC.

The fact that CLEC-1 might still obtain its loops from the ILEC would not justify an FCC rule that would require the ILEC also to provide switching to CLEC-1 on the theory that it is cheaper or more convenient for the ILEC loops to feed directly into the ILEC switch. In fact,

CLEC-1 has numerous alternatives (even aside from deploying its own switch): it could obtain separate collocation space and cross-connect with CLEC-2 at the ILEC's central office; it could share a collocation cage with CLEC-2; or it could simply feed its orders for loops through CLEC-2, so that those loops feed directly into CLEC-2's switch. The key point is that the market, not regulatory fiat, should govern such transactions.

If switching is competitively provided – and the evidence for that proposition is overpowering – then CLECs will be able to provide switching for unbundled loops obtained from the ILEC without the Commission mandating that the two be provided together. What the Commission cannot do is take the least competitive piece of the network (the residential loop) and use that as a justification for requiring ILECs to bundle with the loops all sorts of elements that can be and are competitively provided. That would render the Commission's response to the Supreme Court's remand a sham.

B. The "Necessary" Test for "Proprietary" Elements in Section 251(d)(2)(A)

The term "proprietary" in section 251(d)(2)(A) is not defined in the Act. It is naturally read, however, to include any element as to which the ILEC is properly viewed as having an intellectual property interest. *See Webster's Third New International Dictionary* 1819 (1993) ("proprietary": "one who has exclusive title to a thing: one who possesses the ownership of a thing in his own right"; "made and marketed by a person or persons having the exclusive right to manufacture and sell"). Thus, at a minimum, an element is proprietary if it is protected by

patent, copyright, trade secret, or other similar laws.[17] *See* U.S. Dep't of Justice & Federal Trade Comm'n, *Antitrust Guidelines for the Licensing of Intellectual Property* § 1 (1995).

None of the elements identified by the Commission to date appears to be proprietary in its entirety. But the definition of "network element" in the Act "also includes features, functions, and capabilities that are provided by means of such facility or equipment." 47 U.S.C. § 153(29). As a practical matter, "proprietary network elements" fall into the latter category – they are "include[d]" in other network elements (*i.e.*, facilities or equipment). As the Commission indicated in its *Local Competition Order*, a network element may also be considered proprietary if it contains any "proprietary protocols or elements containing proprietary information." 11 FCC Rcd at 15641-42 [¶ 282]. For instance, many of SBC's network elements contain or operate based on SBC-created intellectual property. Some of its switches, to take one example, contain line class codes, which are proprietary software codes that provide the switch with a set of instructions specific to a given line within a central office, such as instructions for toll and "900" blocking. These codes are proprietary elements, and, accordingly, a switch that contains them may also be considered proprietary.

Network elements that contain proprietary network elements – or, in the language of the Act, network elements "as are proprietary in nature" – require an additional layer of review under section 251(d)(2)(A). That is, in addition to the "impair" inquiry above, which applies to

[17] Any protocol or interface provided by a vendor is also proprietary if the vendor owns the intellectual rights and provides the protocol/interface to the ILEC under a right-to-use license. Under such circumstances, the ILEC does not own the protocol in question and has no right to share it.

all network elements, network elements that contain proprietary features must also be evaluated under the "necessary" standard of section 251(d)(2)(A).

Obviously, if a network element as a whole has already failed the "impair" test applicable to all elements, then the Commission need not even reach the issue of whether proprietary network elements contained therein must be unbundled as well. If a network element as a whole passes the "impair" standard, however, and if the network element contains proprietary features, the Commission's inquiry is not at an end. At that point, the Commission must determine whether any proprietary features it contains are themselves "necessary" to the element in question. In other words, the proper inquiry is whether the element in question – which the Commission has already determined meets the "impair" standard – could be provided without the proprietary network element. If so, then the element should be provided stripped of the proprietary aspect. If not, then the Commission must determine whether it is "necessary" to provide the element, with the proprietary aspect still in place.

An example should be helpful to illustrate this point. A switching element might contain an advanced calling feature that is proprietary. If that proprietary feature is not necessary to the basic functioning of the switch, and hence to the CLEC's ability to compete using that element, then it need not be provided. But if the element cannot function with the proprietary feature removed, then section 251(d)(2) allows the Commission to order access to the entire element if "necessary."[18]

---

[18] The Commission will still have a difficult issue where the proprietary feature is owned by a third-party vendor. The Commission is addressing that problem within this docket in response to a petition filed by MCI WorldCom.

As applied to an element from which the proprietary feature cannot be removed, the "necessary" standard itself is not fundamentally different, from a substantive standpoint, from the "impair" inquiry. Both requirements are designed to further the competitive goals of the Act, and both must therefore focus on whether an efficient competitor would have a meaningful opportunity to compete without access to the element in question. The difference is only one of degree – in applying the "necessary" test, the Commission must require a higher degree of proof that alternatives to that element are not available. Applying the "necessary" test in this way will allow the Commission to preserve investment incentives in proprietary protocols. If the protocol is not necessary for the CLEC to compete, using the element in question, it is protected, and the ILEC that developed it is free to earn a return on its investment that will compensate it for the risk incurred. This limitation is in keeping with the high degree of protection traditionally afforded to intellectual property as against competitors seeking access to that property. *See, e.g., Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1187 & n.64 (1st Cir. 1994) (an author's desire to exclude others from use of its copyrighted work is presumptively valid, and will be overridden only in "rare cases"); *Miller Insituform, Inc. v. Insituform of North America*, 830 F.2d 606, 609 (6th Cir. 1987) ("A patent holder who lawfully acquires a patent" cannot ordinarily be required "to license the patent to others."), *cert. denied*, 484 U.S. 1064 (1988); *United States v. Westinghouse Elec. Corp.*, 648 F.2d 642, 647 (9th Cir. 1981) (same).

This strict standard also comports with Congress's desire to encourage innovation. Special protection for proprietary elements, like patents, is to the public's benefit:

> That the first patent laws were enacted at the second session of our first Congress manifests the importance our founding fathers attached to encouraging inventive genius, a resource that proved to be bountiful throughout this nation's history. The patent laws

> reward the inventor with the power to exclude others . . . [and in] return, the public benefits from the disclosure of inventions, the entrance into the market of valuable products whose invention might have been delayed but for the incentives provided by the patent laws, and the increased competition the patented product creates in the marketplace.

SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989). Congress understood this dynamic when it passed the 1996 Act and was fully aware that an incumbent LEC will lack the incentive to invest in research and development if its innovations must be relinquished to its rivals.[19]

C. Establishment of National Standards for UNE Determination

The Commission has requested comment on its tentative conclusion that it should continue to identify a minimum set of network elements that must be unbundled on a nationwide basis. *Second FNPRM* ¶ 14. Although SBC recognizes the administrative convenience of a national list of UNEs, identifying UNEs on a nationwide basis fails to comply with the language and purpose of section 251(d)(2).

The Supreme Court held, unequivocally, that section 251(d)(2) requires the Commission to look to the availability of elements outside the incumbent's network. Available options – and therefore the ability of CLECs to compete – will necessarily vary depending upon the relevant market in question. That is, whether something is available as a practical matter will depend on the particular element and geographic market at issue. For example, a multitude of CLEC

---

[19] *See* Jorde, Sidak, & Teece Aff. ¶ 31 ("By reducing returns to investment in general, mandatory unbundling at TELRIC prices is likely to reduce innovation by the ILEC in the form of research and development, creation of intellectual property, and general product development."); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974) (right of exclusivity provides "an incentive to inventors to risk the often enormous costs in terms of time, research, and development").

switches in Chicago may not demonstrate that there are viable alternatives to ILEC switches for CLECs in western Montana, but it certainly demonstrates that there are sound options for CLECs that want to reach customers in the Chicago suburbs. As Commissioner Powell explained:

> The availability of elements outside the incumbent's network could potentially turn on many factors, such as the existence of vendors and distribution channels, the presence of competing facilities-based LECs and the price of non-incumbent elements relative to the requesting competitor's ability to pay. These factors are likely to vary significantly from one market to the next. . . . It follows directly, then, that assessments of whether an element is necessary to provide service or whether failing to mandate access to that element would impair a new entrant's ability to provide service will vary significantly among different markets, states and regions.[20]

Indeed, that is precisely why defining the relevant market is perhaps the most fundamental of antitrust tasks.[21] For example, it is first necessary to define the relevant product and geographic markets before determining a firm's market power, deciding whether other products are substitutes, or distinguishing other firms as actual or potential competitors. Similarly, in determining whether a facility is "essential" and must be opened to competitors – the situation most analogous to this one – courts first define the relevant market.[22] Commentators agree this is the preferred approach.[23] "[T]he alleged facility must be shown to

---

[20] Separate Statement of Michael K. Powell, *Second FNPRM*.

[21] *See* Hausman & Sidak Aff. ¶ 106 (pointing out that both the DOJ Merger Guidelines and the FTC Merger Guidelines require defining the relevant market and further observing that the Commission has used these Guidelines in its decisions under the 1996 Act [including its evaluation of major mergers]).

[22] *See, e.g., Blue Cross & Blue Shield United of Wisconsin v. Marshfield Clinic*, 65 F.3d 1406,1409-10 (7th Cir. 1995) (Posner, C.J.), *cert. denied*, 516 U.S. 1184 (1996); *Twin Lab, Inc. v. Weider Health & Fitness*, 900 F.2d 566, 569 (2d Cir. 1990); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 162-63 (8th Cir. 1989); *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 369 n.4 (9th Cir.), *cert. denied*, 488 U.S. 870 (1988); *Consul Ltd. v. Transco Energy Co.*, 805 F.2d 490, 494 n.11 (4th Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987).

[23] *See* IIIA Areeda & Hovenkamp ¶ 773c; A. Kezsbom & A. Goldman, *No Shortcut to Antitrust Analysis: The Twisted Journey of the "Essential Facilities" Doctrine*, 1996 Colum. Bus. L. Rev. 1, 25-27; H. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* ¶ 7.7 (1994).

dominate a properly defined relevant market. If the defendant is not an actual or potential monopolist of a realistically defined market, then it does not possess power over market output or price, and forcing access to its facility would not reduce an actual or potential monopoly power that does not exist." IIIA Areeda & Hovenkamp ¶ 773c at 208. This rationale applies with equal force in the unbundling context. The question of available options only has meaning when the market is defined properly.

That was certainly the conclusion of the Commission in its *Local Competition Order*, when it required ILECs to set UNE prices separately for a minimum of three cost-related rate zones based on geographic density. *See* 47 C.F.R. § 51.507(f). And the Commission has emphasized in many other proceedings that competitive conditions vary widely across product, service, and geographic markets.[24] A similar sensitivity to geographic variations is appropriate here. The inquiry under section 251(d)(2) must be made on a market-specific basis.

For example, hundreds of CLECs have provisioned loops in downtown business areas to serve high-capacity customers. In those markets and for those customers, non-use of ILEC loops has plainly not precluded competitive entry. By contrast, CLECs typically have provisioned fewer loops in rural residential areas and may have less opportunity to serve rural residential areas without access to ILEC loops (although, even here, alternatives such as cable loops and fixed wireless are being developed). The point is that loops cannot be considered on a national level because the alternatives to loops cannot be viewed on a national level. In order fully to abide by the Supreme Court's decision, the Commission must look to alternatives to ILEC network elements, and these alternatives only have meaning when the relevant market is defined.

---

[24] *See, e.g.*, Memorandum Opinion and Order, *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, 20014-19 [¶¶ 49-57] (1997) ("*Bell Atlantic/NYNEX*").

A market-specific analysis need not produce an administrative nightmare. The Commission can readily establish national standards that are as easy to implement as a national list of UNEs. SBC proposes such standards in these comments. Because the relevant market will vary based on the network element, we discuss the appropriate standard for each element in detail in Part II of these comments. For each element that requires unbundling at some level, SBC has provided a market standard that evaluates the relevant options available to CLECs and, in recognition of the Commission's concern for the administrability of its rules, SBC has made an extra effort to devise market standards that can be applied with ease throughout the country.

In addition, given the extremely dynamic character of local exchange competition, the Commission must devise some means for updating UNE determinations. The standards SBC proposes serve a dual purpose: they identify when a network element must be unbundled today and they also serve as self-executing sunsets that will adapt automatically to the further evolution of competition over the next few years. When a market meets the standard, it is no longer appropriate to require unbundling. For example, SBC proposes the following standard for switching: ILECs cannot be required to provide unbundled switching to competitors in rate exchange areas already being served by at least one CLEC voice switch. The Commission can apply that standard today to determine where unbundling is not necessary, and it can also use this standard to determine when additional rate exchange areas come into compliance. SBC proposes tests for the other network elements that are similarly easy to administer.

D. States' Authority Under Section 251(d)(2)

Although States may administer the national standards set by the Commission (*e.g.*, by applying the standards to specific geographic areas or making specific factual determinations), States may not adopt their own standards that deviate from the Commission's. Nor may States add or subtract UNEs. Section 251(d)(3) provides:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that –
>
> (A) establishes access and interconnection obligations of local exchange carriers;
>
> (B) is consistent with the requirements of this section; and
>
> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. § 251(d)(3). Thus, pursuant to section 251(d)(3)(B) and (C), state rules must be consistent with the requirements of section 251(d)(2) and not prevent their implementation. By definition, if a State implements a state standard that diverges from the national standard – whether it be more or less stringent, whether it adds or subtracts a UNE – the state rule will not be "consistent with the requirements of" section 251(d)(2). In its order, the Commission will identify the network elements that may be unbundled under the "necessary" and "impair" requirements of section 251(d)(2) and will establish standards for determining when they have to be provided consistent with those statutory terms. Section 251(d)(2) requires this analysis before any element must be unbundled. A State may not add an element that does not meet the Commission's standards because the additional element will not be "necessary;" nor will lack of access to it "impair" CLECs from providing service. If the element did meet those standards, the Commission would have included it in its rules. Similarly, if the facts in a particular market meet the Commission's standard for when unbundling is required, a State may not decline to order unbundling because such a determination would be inconsistent with the Commission's and would prevent the implementation of section 251. The entire point of this remand is to have the Commission determine which elements meet the statutory test.

That said, States may certainly apply the Commission's standards to specific geographic markets. States may, for example, determine which business customers have 20 lines or more (thus qualifying them as "large" customers), whether a wire center has a collocated CLEC, how many lines are served by a wire center, etc. States may also apply sunset provisions adopted by

the Commission. States may not, however, add to or subtract from the Commission's requirements because to do so would violate section 251(d)(3). As its text makes clear, the policy behind section 251(d)(3) is to promote a consistent regulatory framework throughout the country. This benefits ILECs, CLECs, and consumers alike. Without clear standards established by the Commission that cannot be overruled by the States, ILECs may shy away from improving their network and CLECs may avoid constructing their own facilities, fearing that other CLECs may be able to enter the market without such significant investment if a State opts to add a UNE to the list. The 1996 Act's goal of promoting competition and consumer welfare would be harmed by this reluctance. A Commission standard that cannot be trumped by a State prevents this disincentive effect and allows ILECs and CLECs to innovate and invest with the knowledge that the ground rules will not change. This furthers competition, leading to increased choice, improved quality, and lower prices.

II. Application of Criteria to Previously Identified and Other Network Elements

As explained in Part I, the "impair" inquiry that all network elements must satisfy is necessarily focused on the alternative opportunities available to CLECs. If an efficient new entrant could compete without obtaining the network element in question from the ILEC, then that element should not be included in the Commission's revised Rule 319.

Accordingly, the Commission must evaluate, among other things: (1) the extent of competing carriers' existing facilities; (2) how readily competing carriers could build-out or add to those facilities through additional purchases of equipment or services from sources other than the ILECs; (3) the extent to which sources other than the ILECs actually do, or potentially could, supply services or equipment that are viable substitutes for the ILECs' network elements; and (4) how much it would cost – on a forward-looking, long-run incremental basis – for a competitive carrier to obtain a particular element from a source other than an ILEC.

Obviously, the best evidence of what an efficient competitor *could* do is what actual competitors *are* doing. If a competitor is currently providing service without access to a particular ILEC element, that is conclusive evidence that an efficient competitor *can* compete without access to the element in question.[25] Or, as Commissioner Powell has put it, "to the extent other facilities-based competitors do *not* use elements of the incumbent's network, the presence of those competitors in a particular market should be probative in evaluating whether other firms would be 'impaired' in their ability to provide service in that market absent mandated access to the incumbent's elements."[26] It is also important to look to what the CLECs *can* obtain, or potentially *could* obtain, elsewhere. These options must also be analyzed because they demonstrate the ease with which an efficient CLEC could enter the market even if CLECs have not done so just yet.

Accordingly, in conjunction with other ILECs, SBC has commissioned a comprehensive factual and market study of the current opportunities available to CLECs to compete without access to particular ILEC elements.[27] The report focuses on what CLECs have actually done and

---

[25] As Justice Breyer explained in his separate concurrence on this point, while it might make sense in some circumstances to require a railroad to share "bridges, tunnels, or track" – items that cannot practically be duplicated by a competitor – it does not make sense "to require a railroad to share its locomotives, fuel, or workforce" – all items that a competitor can readily obtain from other sources. *Iowa Utils. Bd.*, 119 S. Ct. at 753 (Breyer, J., concurring in part and dissenting in part).

[26] Separate Statement of Michael K. Powell, *Second FNPRM*. *See also* Hausman & Sidak Aff. ¶ 58 ("If substitutes outside the ILEC network are available, that availability occurs because some firms have made the rational economic decision that they can efficiently provide services that employ those elements.").

[27] *See* Peter W. Huber & Evan T. Leo, UNE Fact Report (submitted by USTA on behalf of Ameritech, Bell Atlantic, BellSouth, GTE, SBC, U S WEST, and USTA) ("UNE Fact Report"). The *Second FNPRM* sought comment on many issues that required a factual response, and stated as a primary purpose that the Commission wanted to "refresh the record" for its consideration of these important issues. Accordingly, the parties participating in the UNE Fact Report endeavored to provide all the reliable factual information that they had, with due consideration being given to that data that any entity may have deemed confidential or sensitive. Thus, all confidential information regarding competitors' use of any network element, capability or service was kept strictly confidential as to all specific entities, even as between the ILEC participants in the UNE Fact Report, and is presented only in aggregate form in the UNE Fact Report so as not to identify any specific competitor.

are currently doing. To a lesser extent, the report also examines the ease with which CLECs could obtain various network elements even if they currently are not doing so. Because this evidence is less probative than evidence of current, actual provision, we have relied on it to a much lesser extent in devising our proposed standards. Our proposed standards therefore represent the most conservative view of what is available; if we have erred, we have erred on the side of unbundling rather than not.[28]

As the Commission requested, we are providing information on each of the network elements identified by the Commission. For each such element, we have proposed a national standard for the Commission to adopt. For some elements, the national standard we propose is to require unbundling everywhere. For other elements, the national standard we recommend is no unbundling anywhere. For still other elements, we have provided a standard that will lead to unbundling in some geographic markets, but not in others. The basic rationale behind each standard we propose, however, is the same: we have extensively reviewed the current available market facts to determine whether alternatives to the ILEC network are available and whether an efficient competitor would have meaningful opportunities for competitive entry without access to the ILEC network.[29] Because this standard produces the optimal level of unbundling, the test we propose for each element will increase competition without discouraging investment and

---

[28] Our presentation is in fact doubly conservative, because we do not have access to the most complete and comprehensive evidence of what CLECs are actually doing in the marketplace today. Such information is known best to the CLECs themselves. That is why SBC urged the Commission to require CLECs to submit such information. *See* SBC White Paper (submitted Feb. 24, 1999). To the extent that they have failed to do so with respect to any particular network element – and the Commission has failed to direct them to supply such information – there will not be an adequate basis for the Commission to require the unbundling of that element.

[29] We have focused on the test for "impair" because it applies to all network elements, and, as we noted above, we believe the "necessary" and "impair" standards are substantively similar.